UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	))	Docket No. AD16-16-000

MOTION TO LODGE OF THE EDISON ELECTRIC INSTITUTE

I. INTRODUCTION

The Edison Electric Institute ("EEI") thanks the Federal Energy Regulatory Commission ("FERC" or "Commission") for the announcement during the May 17, 2018 Open Meeting that the Commission would be reviewing its rules implementing the provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). As the Commission evaluates how to best proceed in terms of both process and scope, EEI submits this Motion to Lodge comments that EEI has filed in response to individual cases in the instant docket. The issues raised in these cases reflect the changes that have occurred in the markets since PURPA was enacted, including those that have occurred since PURPA was modified in 2005, and demonstrates the need for the Commission to undertake a holistic review of its rules and regulations implementing PURPA to ensure that they are consistent with today's electric markets.

II. COMMENTS

PURPA was enacted to promote energy conservation and foster greater use of domestic energy sources, including renewable energy sources. PURPA requires the Commission to prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration facilities and small power production facilities, of not more than 80 megawatts capacity, which rules require electric utilities to offer to sell to, and purchase from,

qualifying cogeneration facilities and qualifying small power production facilities (collectively qualifying facilities or QFs") any energy and capacity requested or made available (as applicable) by the QF.[1] PURPA provides simple directives for purchases of power from QFs by electric utilities: "the rates for such purchases – 1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and 2) shall not discriminate against qualifying cogenerators or qualifying small power producers."[2] In addition, PURPA directs that the rate for purchases of QF power shall not "exceed[] the incremental cost to the electric utility."[3] The Commission has significant discretion in developing the guidelines implementing PURPA and the obligation to implement PURPA in coordination with state regulatory authorities. Current Commission policy on how PURPA should be implemented is embodied in Commission regulation and additional guidance is provided by the Commission's orders in individual cases.

These individual cases are usually Petitions for Declaratory Order, Petitions for Enforcement or QF applications (collectively "Petitions"). Issues raised in the Petition may be of broad applicability that impact how the Commission develops guidelines interpreting and implementing PURPA. As such, these issues would benefit from a broader conversation and should be considered by the Commission in the instant docket.

In 2018, EEI filed comments in response to individual Petitions filed with the Commission that EEI would like to lodge in the instant docket as they raise issues of broad applicability. Since PURPA was first enacted, open access to transmission, greater competition among generators in organized spot and bilateral wholesale markets, improvements in

[1] 16 USC 824(a) (2012).

[2] 16 USC 824-1-3(b) (2012).

[3] 16 USC 824a-3(b) (2012).

technology, lower costs of technology, and implementation of state and federal policies have all helped drive changes in the fuel mix and the use of new technologies. The issues raised in these Petitions are illustrative of the resulting changes occurring in the market and should be addressed in this docket as part of a holistic review of the Commission's regulations implementing PURPA.[4] These include issues related to:

- Petition for Declaratory Order requesting that FERC override a state commission's QF classification of a battery storage system associated with renewable resource. Raises issues about the state's ability and discretion determine avoided cost rates and classification of the QF.[5]

- Application for Certification of Qualifying Small Power Production QF Status seeking qualification as a QF for an 80 MW wind facility that has been modified to include a 40 MW battery storage facility on the same site. Raises issues about the Commission's interpretation of power production capacity as battery storage is attached to 80 MW QF facilities.[6]

- Petition for Declaratory Order requesting that the Commission waive the QF certification filing requirements for small (≤ 20 kW) residential photovoltaic systems and complementary battery storage systems owned by the developer and leased to customers and that waiver apply regardless of whether such systems aggregate to over one megawatt ("1 MW") within one mile. Raises issues related to the relationship between the aggregation of distributed energy resources and PURPA, the role of storage, changes to the self-certification process and the one-mile rule among others.[7]

- Petition for Declaratory Order raising the question of whether avoided costs could be set at zero, consistent with Order No. 69, if the energy from QFs is not needed to serve load.[8]

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[4] EEI is only including comments in which EEI advocated for issues to be addressed in this docket.

[5] *Franklin Energy Storage One, LLC, Franklin Energy Storage Two, LLC, Franklin Energy Storage Three, LLC, Franklin Energy Storage Four, LLC Petition for Declaratory Order and Petition for Enforcement Pursuant to Section 210(h) of the Public Utility Regulatory Policies Act of 1978,* Motion to Intervene and Comments of the Edison Electric Institute, Docket No. EL18-5-000 (January 16, 2018) (Attachment A).

[6] *Beaver Creek Wind II LLC, Application for Certification of Qualifying Small Power Production Facility Status*, Motion to Intervene and Comments of the Edison Electric Institute, Docket No. QF17-673-002 (September 4, 2018) (Attachment B).

[7] *Sunrun Inc., Petition for Declaratory Order*, Motion to Intervene and Comments of the Edison Electric Institute Docket No. EL18-205-000 (October 28, 2018) (Attachment C).

[8] *Northwestern Corporation, Petition for Declaratory Orde*r, Motion to Intervene and Comments of the Edison Electric Institute, Docket No. EL19-3-000 (November 1, 2018) (Attachment D).

- Petition for Enforcement raising questions about the state commission's decision to determine when the legally enforceable obligation ("LEO") to purchase the energy is created.[9]

As reflected in these Petitions, the markets have changed significantly since PURPA was enacted and the Commission developed rules implementing PUPRA. Since PURPA was first enacted, open access to transmission, greater competition among generators in organized spot and bilateral wholesale markets, improvements in technology, lower costs of technology, and implementation of state and federal policies have all helped drive changes in the fuel mix and the use of new technologies. It is within this environment of new technologies and access to markets that QFs operate.

While EEI recognizes that there are aspects of PURPA that are legislatively required, it is the Commission's obligation to prescribe, and from time to time revise, its rules interpreting and implementing PURPA. In comments filed with the Commission, EEI has provided suggestions as to the types of changes that the Commission can make to update its PURPA implementation rules to reflect today's markets while still meeting its legislative mandate. Components of those issues are reflected in the Petitions discussed herein. Due to changes in the energy markets, FERC's rules implementing PURPA promote the uneven, unplanned, and uneconomic development of QFs and provide for subsidies that promote QFs at the expense of customers, system reliability, and other more competitive resources. Accordingly, EEI urges the Commission to take a holistic review of its rules and regulations and institute broader reforms to ensure that PURPA's implementation is aligned with today's energy landscape.

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[9] *Great Wind Farm 2, LLC, Great Wind Farm 3, LLC,* Petition for Enforcement *Pursuant to Section 210(h) of the Public Utility Regulatory Policies Act of 1978,* Motion to Intervene and Comments of the Edison Electric Institute, Docket No. EL19-25-000 (December 27, 2018) (Attachment E).

III. CONCLUSION

EEI appreciates the Commission's willingness to evaluate its rules and regulations implementing PURPA. EEI encourages the Commission to take a holistic review of its regulations and make the changes necessary to help ensure that it is implementing PURPA in a manner that recognizes today's markets and the important role of the states. EEI looks forward to working with the Commission and other stakeholders on this important issue going forward.

Respectfully Submitted,

/s/Lopa Parikh

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February 4, 2019

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Franklin Energy Storage One, LLC	)	
Franklin Energy Storage Two, LLC	)	Docket No. EL18-50-000
Franklin Energy Storage Three, LLC	)	
Franklin Energy Storage Four, LLC	)	

MOTION TO INTERVENE AND COMMENTS OF THE EDISON ELECTRIC INSTITUTE

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, and the Commission's Notice of Petition for Declaratory Order dated June 5, 2017, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby respectfully submits this Motion to Intervene and Protest on the Petition for Declaratory Order ("Petition") of Franklin Energy Storage One, LLC, Franklin Energy Storage Two, LLC, Franklin Energy Storage Three, LLC and Franklin Energy Storage Four, LLC. (collectively "Franklin").

I. MOTION TO INTERVENE

Pursuant to Rule 214, 18 C.F.R. § 385.214, EEI submits the following in support of its Motion. EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly and indirectly employ more than one million workers. The electric power industry supports more than 7 million jobs in communities across the United States. Safe, reliable, affordable, and clean energy powers the economy and enhances the lives of all

Americans. EEI's diverse membership includes electric utilities that operate and serve customers in Idaho and that are regulated by the Idaho Public Utilities Commission ("IPUC").

While the Petition addresses a specific order issued by the IPUC, the Petition raises important issues regarding the federal and state role in implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Section 210 of PURPA requires all electric utilities to purchase electricity at "avoided cost" from qualifying small power producers or qualifying co-generation facilities, referred to as Qualifying Facilities ("QFs"). As electric utilities, all EEI members are subject to PURPA's mandatory purchase requirements. While EEI does not, through these comments, take a position on the specific QF rules in Idaho, EEI would like to highlight the need for collaborative federalism in implementing PURPA as well as the need for the Commission to continue to engage in PURPA policy reform to reflect the changes that have taken place in the energy markets since PURPA was implemented in 1978.

EEI provides a broad-based perspective on the issues raised in the Petition that cannot be adequately represented by any other party. EEI respectfully requests that the Commission grant this Motion to Intervene and allow EEI to become a party to the above-captioned proceedings.

II. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to this Motion should be served upon the following individuals who should be included on the official service lists compiled by the Secretary of the Commission in these proceedings:

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III. COMMENTS

PURPA was enacted to promote energy conservation and foster greater use of domestic energy sources, including renewable energy sources. Section 210 of PURPA[1] requires all electric utilities to purchase electricity at "avoided cost" from QFs and it is the Commission's obligation to implement PURPA in coordination with state regulatory authorities. Current Commission policy on how PURPA should be implemented is embodied in FERC rules as well as precedent established in Commission orders in individual cases. It is this spirit of cooperative federalism and the federal and state role in implementing PURPA that is at issue in the instant Petition.

The Petition states that the Commission has exclusive jurisdiction over the certification of QF facilities under PURPA. EEI does not contest Franklin's status as a self-certified QF in these comments.[2] In the underlying state proceeding, the IPUC treated Franklin as a QF and the question before the IPUC was determining the appropriate avoided cost rate and contract term for the QF facilities.[3] Under PURPA, state public utility commissions are responsible for calculating the avoided-cost rates and setting associated contract terms and conditions for utilities subject to their jurisdiction. State commissions may accomplish this by issuing regulations, addressing particular issues on a case-by-case basis, or by taking any other action designed to give effect to the Commission's rules.[4] State commissions are in the best position to

[1] 16 U.S.C. § 824a-3 (2012).

[2] Franklin self-certified as an "Qualifying small power production facility status" type with "Other renewable resource" as the primary energy input under sections 1k and 6a respectively of Commission Form 556 in docket QF17-581.

[3] *In the Matter of the Petition of Idaho Power Company for a Declaratory Order Regarding Proper Contract Terms, Conditions and Avoided Cost Pricing for Battery Storage Facilities,* Idaho Public Service Commission, Case No. IPC-E-17-01, Order No. 33785 (July 13, 2017) ("Order No. 33785).

[4] *See e.g. Portland General Co*. v. FERC., 854 F.3d 692 (D.C. Cir. 2017) (Under the Act, FERC prescribes "broad, generally applicable rules" which state commissions implement at the local level.); FERC v. Mississippi, 456 U.S. 742, 751 (1982) (State commissions "may comply with the statutory requirements by issuing regulations, by

determine the both the avoided costs and terms and conditions for QF contracts, as they are aware of the generation make up and needs of the system in their respective states and are responsible for ensuring that the retail rates are just and reasonable.

In *Luz Development and Finance Corporation* the Commission indicated that a battery storage system does not independently meet the definition of a primary energy source and that "it is necessary to look to the source of [the battery's] energy as the ultimate primary energy source of the facility."[5] IPUC referred to this case in determining that that the Franklin facility's primary source of energy was solar and the IPUC treated the facilities as a solar QF based on their primary energy source.[6] It is this finding that Franklin disputes and states that the company would have received more favorable contracts rates and terms if it had not been classified as a solar QF. Under a collaborative federalism statute, such as PURPA, the Commission should be respectful of the state's role so as not to diminish the role Congress reserved to the states.[7] The determination of avoided cost rates for QFs, the classification of QFs under state rules and the implementation of Commission orders are appropriately within the state's jurisdiction and as such, the Petition should be rejected.

Since PURPA was first enacted, open access to transmission, greater competition among generators in organized spot and bilateral wholesale markets, improvements in technology, lower costs of technology, and implementation of state and federal policies have all helped drive

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resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules."); PURPA § 210(b), (f), 16 U.S.C. § 824a-3(b), (f).

[5] *Luz Development and Finance Corporation*, 51 FERC P 61078 (1990) ("Luz").

[6] Order No, 33785 at 11-13.

[7] *See, e.g., Portland General Co.* v. FERC., 854 F.3d 692, 698 (D.C. Cir. 2017) ("State-based adjudication serves as the mainstay for enforcing PURPA rights. PURPA section 210(g) … permits "any person" to "bring an action against any electric utility [or] qualifying small power producer ... to enforce any requirement" created by a state's implementation of PURPA… [T]he statute channels actions under this subsection into "the appropriate State court ..." PURPA gives FERC and the federal courts a separate and more limited role.")

changes in the fuel mix and the use of new technologies. The Petition highlights the continued need for Commission activity on PURPA policy reform and the need to build on its existing record[8] and institute a broader proceeding to modernize the FERC rules and regulations implementing PURPA. For example, the self-certification rules and interpretation of Commission precedent are both implicated in this Petition.

While EEI is not taking a position, in these comments, on what types of facilities should be certified as QFs or the QF status of the Franklin facilities, EEI would encourage the Commission in a separate proceeding to revisit the Commission's self -certification process to ensure that states, utilities, and other stakeholders have adequate notice and opportunity for comment. Order No. 732 provides for streamlined certification of qualifying facilities.[9] Under the regulations, QFs have the choice to either self-certify without payment, which requires protestors to pay to object, or to pay for an application for certification to receive a Commission order. By allowing this choice, the Commission has shifted the burden to other stakeholders from the applicant. With the increasing use of new technologies and increased access to markets, the Commission should review these rules to ensure that stakeholders have notice and an opportunity to comment when QF certification requests are filed. Since FERC has exclusive jurisdiction over QF certifications, a transparent process will also help alleviate concerns that may appear in the state process.

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[8] FERC convened a Technical Conference on June 29, 2016 to discuss issues related to the mandatory purchase obligation and the determination of avoided costs for the purchases in light of the changing electric market. *Implementation Issues Under the Public Utility Regulatory Policies Act,* Supplemental Notice Concerning Technical Conference, Docket No. AD16-16-000 (March 4, 2016) ("Technical Conference"). EEI sponsored two witnesses and submitted post-technical conference comments in the docket. *See.* Statement of Joel Schmidt, Panel 1 – Mandatory Purchase Obligation; Statement of Al Brogan, Panel 2 – Avoided Costs; and Post-Technical Conference Comments of the Edison Electric Institute.

[9] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, 130 FERC ¶ 61,214, Order No 732 (March 19, 2010).

IV. CONCLUSION

EEI appreciates the opportunity to comment and urges the Commission not to grant the requested relief for the reasons stated herein.

Respectfully Submitted,

/s/ *Lopa Parikh*

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January 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 16th day of January 2018.

/s/ *Lopa Parikh*

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ATTACHMENT B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Beaver Creek Wind II, L.L.C.	)	Docket No. QF17-673-002

MOTION TO INTERVENE AND COMMENTS
OF THE EDISON ELECTRIC INSTITUTE

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, and the Commission's August 15, 2018 Combined Notice of filing, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby respectfully submits this Motion to Intervene and Comment on Beaver Creek Wind II, LLC's ("Beaver Creek") Application for Certification of Qualifying Small Power Production QF Status ("Application").

In its Application, Beaver Creek seeks QF certification for an 80 MW wind facility that has been modified to include a 40 MW battery storage facility on the same site. EEI supports the use of energy storage and recognizes the benefits that energy storage provides to the system. Accordingly, EEI has been supportive of the Commission's efforts to allow energy storage resources to participate in the wholesale markets on a comparable basis with other resources. The question in the instant case is not whether a battery storage facility should be used to improve the dispatchability and output of a wind resource, but rather whether the combined resource meets the requirements of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). As discussed herein, the Application raises issues of broader applicability regarding the Commission's regulations implementing PURPA. Accordingly, EEI urges the

Commission to stay the application until the broader issues are discussed as part of a holistic review of the Commission's regulations implementing PURPA.

I. MOTION TO INTERVENE

Pursuant to Rule 214, 18 C.F.R. § 385.214, EEI submits the following in support of its Motion. EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. Safe, reliable, affordable, and clean energy powers the economy and enhances the lives of all Americans. EEI's diverse membership includes electric utilities that operate and serve customers in Montana.

In its Application, Beaver Creek seeks certification for an 80 MW wind facility that has been modified to include a 40 MW battery storage facility on the same site. Beaver Creek alleges that the addition of the battery storage facility does not increase the energy production of its facility. This is an issue of first impression for the Commission and raises important issues regarding interpretation of the "size of the facility" criteria for qualifying small power production facilities as contained in PURPA. Section 210 of PURPA[1] requires all electric utilities to purchase electricity at "avoided cost" from qualifying small power producers or qualifying co-generation facilities, referred to as Qualifying Facilities ("QFs"). As electric utilities, EEI members are subject to PURPA's mandatory purchase requirements from QFs that meet the size requirements outlined in PURPA. While the mandatory purchase obligation and the size limits for QF facilities are established by PURPA, it is the Commission's obligation to interpret and

[1] 16 U.S.C. § 824a-3 (2012).

implement PURPA in coordination with state regulatory authorities. Current Commission policy on how PURPA should be implemented is embodied in FERC rules as well as precedent established in Commission orders in individual cases. As such, EEI's members will be directly affected by any Commission decision in the instant docket.

EEI provides a broad-based perspective on the issues raised in the Application that cannot be adequately represented by any other party. EEI respectfully requests that the Commission grant this Motion to Intervene and allow EEI to become a party to the above-captioned proceedings.

II. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to this Motion should be served upon the following individuals who should be included on the official service lists compiled by the Secretary of the Commission in these proceedings:

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III. COMMENTS

Since PURPA was enacted and the Commission's rules implementing PURPA were developed, open access to transmission, greater competition among generators in organized spot and bilateral wholesale markets, improvements in technology, lower costs of technology, and implementation of state and federal policies have helped drive changes in the fuel mix as well as the increased use of new technologies. The Application highlights the continued need for

Commission activity on PURPA policy reform, including the need to build on its existing record[2] and to institute a broader proceeding to determine if, in light of the evolution in the energy markets, changes are needed to modernize the Commission's regulations implementing PURPA. The Application raises important questions regarding whether the Commission's regulations and orders interpreting PURPA's definition of small power production facility are still appropriate in light of the growing use of new technologies, including battery storage.

PURPA defines a small power production facility as "a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and (ii) has a power production capacity, which, together with any other facilities located at the same site is not greater than 80 megawatts."[3] In Order No. 732, the Commission provided for streamlined certification of qualifying facilities under which QFs have the choice to either self-certify without payment, which requires protestors to pay to object, or to pay for an application for certification to receive a Commission order.[4] While the Commission has not issued a rule, regulation or order specifically defining "power production capacity," Form 556, which applicants fill out as part of the self-certification process, requires applicants to list in line 7a the gross power production under the most favorable design conditions and then deduct a variety of losses from the gross power production capacity to get to the net power

[2] FERC convened a Technical Conference on June 29, 2016 to discuss issues related to the mandatory purchase obligation and the determination of avoided costs for the purchases in light of the changing electric market. *Implementation Issues Under the Public Utility Regulatory Policies Act,* Supplemental Notice Concerning Technical Conference, Docket No. AD16-16-000 (March 4, 2016) ("Technical Conference"). EEI sponsored two witnesses and submitted post-technical conference comments and supplemental comments in the docket.

[3] 16 U.S.C. § 796 (17)(A) (2012).

[4] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, 130 FERC ¶ 61,214, Order No 732 (2010).

production capacity in line 7g.[5] Although not explicitly stated, it appears that the Commission uses the net power production capacity to determine if a facility should be certified as a QF. The form does not specifically address the inclusion of other resources on the same site. And in this case, Beaver Creek's April 2018 self-certification application did not include the battery storage facility in lines 7a through 7g, which determine the net production capacity of the facilities on the same site.[6]

In *Luz Development and Finance Corporation*, the Commission indicated that a battery storage system does not independently meet the definition of a primary energy source and that "it is necessary to look to the source of [the battery's] energy as the ultimate primary energy source of the facility."[7] The Commission has not issued any subsequent order clarifying the treatment of battery storage facilities under PURPA and as such, the issues raised in the Application have not been previously considered by the Commission. These include whether or not net production capacity is still an appropriate interpretation of the phrase "power production capacity" given that the use of battery storage in conjunction with a generation facility increases the available capacity beyond 80 MW; whether a statement that not more than 80 MW will be injected onto the grid absent supporting evidence is sufficient; and whether the Commission's interpretation of same site creates the potential for gaming.

[5] Form 556 at p 1, 9. https://www.ferc.gov/docs-filing/forms/form-556/form-556.pdf

[6] Form 556, Beaver Creek II, LLC at 9. The description of the facility indicates that there will be a 160 MW battery system of which 40 MW will presumably be allocated to this project.

[7] *Luz Development and Finance Corporation*, 51 FERC ¶ 61,078 (1990) ("Luz").

A. The Application Raises Questions as to Whether Beaver Creek Exceeds the Size Requirement Specified in PURPA

Beaver Creek does not meet the size requirement specified in PURPA, as the power production capacity together with any other facilities located at the same site is greater than 80 megawatts. Beaver Creek states that it was certified as a QF in 2017 and filed a self-certification in April 16, 2018 to reflect the addition of the battery storage system.[8] Beaver Creek goes on to state that "the Project falls squarely within the requirements established within the Commission's regulations and existing precedent" and the filing was being made out of an abundance of caution to ensure that it is recognized as a QF by the interconnected utility and applicable state regulatory authority.[9] Beaver Creek states that the battery storage system will receive 100% of its energy from the wind farm and that "at no point will Beaver Creek Wind II inject more than 80 MW to the grid."[10] "It is Beaver Creek Wind II's position that injections of energy stored in the associated battery storage system at a point in time when the wind turbines are at full output (i.e., 80 MWs) would not violate the size limitation under the Commission's regulations. Because the total wind power output for the Project can never exceed 80 MWs, the battery storage system simply provides a time-shifting of the wind production, and not additional generation, limiting the total production to 80 MW of renewable energy from the Project."[11]

It is far from clear that the proposed facility falls within the Commission's regulations for QF certification or qualifies as a QF facility under PURPA. Through these statements, it appears that Beaver Creek is trying to have it both ways by saying that the combined facility will not inject more than 80 MW onto the grid except when the wind facility is operating at full output at

[8] Application at FN 1.

[9] Application at 1-2.

[10] Application at 3.

[11] Application at FN 3.

which point the extra energy being put on the grid should be ignored. PURPA specifically established an 80 MW threshold for QFs, and if energy in excess of 80 MW is placed on the system at any time, then the facility does not meet the requirements put in place by PURPA.

Thus, the Application raises questions that the Commission must address that have far reaching implications for utilities, state regulatory authorities and QFs. These include:

- Is the net production capacity still an appropriate way to determine power production capacity under PURPA?
- If the resource injects more than 80 MW at any time is that prima facie proof that the facility exceeds the 80 MW ceiling to be a QF?
- What type of corroborating evidence should be provided to the Commission to ensure that energy in excess of 80MW will not be injected onto the grid. In this case, other than a statement that no more than 80 MW will be injected onto the grid and a statement that output will be controlled by a wind turbine SCADA system, the Application does not contain any supporting documentation that this will be the case. Is this sufficient?
- If the resource places more than 80 MW onto the grid, there may be impacts on the transmission system of the interconnecting utility that could impact system reliability. What should the ramifications be for the QF for exceeding the 80 MW threshold?

In Order No. 845, the Commission added electric storage resources to the definition of a "Generating Facility" and adopted the "NOPR proposal to modify the definition of "Generating Facility" in the *pro forma* LGIP and *pro forma* LGIA to include "and/or storage for later

injection."[12] The Commission agreed with commenters that modeling electric storage resources as a single asset has merits, however, noting the lack of experience with interconnecting electric storage resources and a desire for regional flexibility, the Commission declined to impose any standard requirements for electric storage resources. "In this Final Rule, we adopt the NOPR proposal to modify sections 3.1, 6.3, 7.3, 8.2, and Appendix 1 of the *pro forma* LGIP to allow interconnection customers to request interconnection service that is lower than full generating facility capacity, recognizing the need for proper control technologies and penalties to ensure that the generating facility does not inject energy above the requested level of service. We also withdraw the proposal to revise the definitions of 'Large Generating Facility' and 'Small Generating Facility' in the *pro forma* LGIA so that they are based on the level of interconnection service for the generating facility rather than the generating facility capacity, and make certain clarifications…"[13]

Thus, Order No. 845 indicates that while Beaver Creek can request a lower interconnection service than its generating facility's capacity, the battery storage capacity should be included when determining the size of the facility[14] which was not done in this case. The Commission also recognizes the need for penalties if energy is injected above the requested level of service. The documentation needed to show that proper technologies have been installed or the penalties associated with injecting above the requested level of service are not outlined in

[12] *Reform of Generator Interconnection Procedures and Agreements,* Order No. 845, 163 FERC ¶ 61,043 at P 275 (2018) ("Order No. 845").

[13] Order No. 845 at P 367.

[14] In this case, Beaver Creek requested Feasibility and System Impact Studies for 362 MW which is the size of the four wind facilities without the capacity of the battery storage facilities. *See*. Feasibility and System Impact Studies as posted on Northwestern Energy's OASIS website:
Feasibility Study: hhttp://www.oatioasis.com/NWMT/NWMTdocs/Project300-FeasibilityStudy.PDF
System Impact Study: http://www.oatioasis.com/nwmt/nwmtdocs/Project300-SystemImpactStudy.pdf

Order No. 845. Contrary to Beaver Creek's assertion, it is far from clear that the "Project falls squarely within the requirements established within the Commission's regulations and existing precedent." The Application raises questions of broader applicability that need to be addressed by the Commission in broader proceeding. EEI suggests that the Commission stay the Application until these issues can be discussed in a broader proceeding.

B. The Application Raises Questions About the the Commission's Interpretation of Same Site

The Application also raises questions about the Commission's interpretation of same site. In Order No. 69 the Commission stated that facilities are considered to be "located at the same site as the facility for which [QF] qualification is sought if the facilities are located within one mile of the facility for which qualification is sought."[15] This interpretation is known as the one-mile rule and the presumption is irrebuttable. The questions of whether the Commission should consider other factors such as whether generating sources are owned by the same person(s) or its affiliates with sales to the same electric utility, have common financing, have common land lease or land rights, have common or concurrent regulatory application(s), or are connected through a common interconnection facility in determining whether facilities are located on the same site are currently pending before the Commission.

While the instant Application only refers to Beaver Creek Wind II, a filing with the Montana Public Service Commission asking the state commission to establish capacity payments

[15] 18 C.F.R. § 292.204(a)(2)(i-ii) (issued in *Small Power Production and Cogeneration Facilities; Regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128*, order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part, Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part, Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983)).

and set contract terms for 163 MW of battery storage for Beaver Creek facilities[16] seems to indicate that facility in this filing is part of a larger project. Given that the question of whether the Commission's interpretation of same site should be modernized is pending before the Commission and possibly implicated in this case, the Commission should consider the Application as part of a holistic review of its regulations and orders implementing PURPA.

IV. CONCLUSION

The important issues raised in the Application have not previously been decided by the Commission and have broad implications for utilities, QFs and state regulatory agencies. Since FERC has exclusive jurisdiction over QF certification, a transparent process that addresses these issues in the context of a larger proceeding will help ensure that there is notice and opportunity for comment by all affected stakeholders. EEI appreciates the opportunity to comment and urges the Commission to hold a decision in abeyance until the issues raised herein are addressed.

Respectfully Submitted,

/s/ Lopa Parikh

_____

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September 4, 2018

[16] Caithness Beaver Creek LLC's Petition to set Terms and Conditions for Four Qualifying Small Power Production Facilities Pursuant to M.C.A. § 69-3-603, Docket No. D2018.8.52 (Aug. 10, 2018). In 2017, Beaver Creek Wind I, LLC, Beaver Creek Wind II, LLC, Beaver Creek Wind III, LLC, and Beaver Creek Wind IV, LLC were self-certified or certified as QFs and have common operating and maintenance agreement, common interests with nearby qualifying facilities, and are within one mile of other qualifying facilities. *See Beaver Creek Wind II*, 160 FERC ¶ 61,052 (2017).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 4th day of September 2018.

/s/ Lopa Parikh

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ATTACHMENT C

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Sunrun, Inc.	)	Docket No. EL18-205-000

MOTION TO INTERVENE AND COMMENTS OF THE EDISON ELECTRIC INSTITUTE

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, and the Commission's Notice of Petition for Declaratory Order dated September 25, 2018, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby respectfully submits this Motion to Intervene and Comments in response to the Petition for Declaratory Order ("Petition") of Sunrun Inc. ("Sunrun"). As discussed herein, the Petition raises a number of issues that have been raised in generic proceedings pending before the Commission and the issues should be considered in those dockets rather than through this Petition.

I. MOTION TO INTERVENE

Pursuant to Rule 214, 18 C.F.R. § 385.214, EEI submits the following in support of its Motion. EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly and indirectly employ more than one million workers. The electric power industry supports more than 7 million jobs in communities across the United States. Safe, reliable, affordable, and clean energy powers the economy and enhances the lives of all Americans.

The Petition raises important issues regarding the Commission's rules implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Section 210 of PURPA requires all electric utilities to purchase electricity at "avoided cost" from qualifying small power producers or qualifying co-generation facilities, referred to as Qualifying Facilities ("QFs"). As electric utilities, all EEI members are subject to PURPA's mandatory purchase requirements, unless granted an exemption by the Commission.[1]

In its Petition, Sunrun requests that the Commission "waive qualifying facility (QF) certification filing requirements for residential solar photovoltaic (PV) systems, irrespective of whether such systems aggregate to over one megawatt (1 MW) within one mile."[2] The Petition, which involves leased-with-option-to buy ≤ 20 kW, with or without complementary battery systems, residential solar photovoltaic ("PV") systems raises a number of issues of broad import including who has the legal authority over the electric output of such systems, i.e., who legally can decide to 1) sell the output and/or 2) use the output for net metering purposes, the owner of the PV (e.g., Sunrun) system or the residential customer of the utility.

Current Commission policy on how PURPA should be implemented is embodied in FERC rules as well as precedent established in Commission orders in individual cases. As such, EEI's members will be directly affected by any Commission decision in the instant docket. Accordingly, EEI provides a broad-based perspective on the issues raised in the Petition that cannot be adequately represented by any other party. EEI respectfully requests that the

[1] *See* 18 C.F.R. § 292.309. The Commission has found that there is a rebuttable presumption that QFs above 20MW have non-discriminatory access to wholesale markets in the Midwest Independent Transmission System Operator ("MISO"), PJM Interconnection ("PJM"), ISO-New England ("ISONE"), the New York Independent System Operator ("NYISO"), the California Independent System Operator (CAISO) and ERCOT have relieved the electric utilities in these markets of their mandatory purchase obligation from these resources.

[2] Petition at 1

Commission grant this Motion to Intervene and allow EEI to become a party to the above-captioned proceeding.

II. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to this Motion should be served upon the following individuals who should be included on the official service list compiled by the Secretary of the Commission in this proceeding:

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III. COMMENTS

Since PURPA was first enacted, open access to transmission, greater competition among generators in organized spot and bilateral wholesale markets, improvements in technology, lower costs of technology, and implementation of state and federal policies have all helped drive changes in the fuel mix and the use of new technologies. It is within this environment of new technologies and access to markets that Sunrun operates. PURPA was enacted to promote energy conservation in a manner that improved system reliability and ensured just and reasonable rates for customers. Sunrun's Petition demonstrates how the markets have evolved since the Commission adopted its regulations implementing PURPA and highlights the continued need for Commission focus on PURPA policy evolution and reform, including the

need to build on its existing record in Docket No. AD16-16-000[3] and institute a broader proceeding to determine if changes are needed to modernize the Commission's regulations implementing PURPA.

Through its Petition, Sunrun requests that the Commission waive the QF certification filing requirements for small (≤ 20kW) residential PV systems and related equipment that it has leased to residential customers with an option to buy. Sunrun requests that this waiver apply regardless of whether such systems aggregate to over one megawatt ("1 MW") within one mile.[4] Furthermore, Sunrun states that "related equipment" refers to "complementary residential battery systems," and that the waiver requested should apply to these battery storage systems as well."[5] Sunrun indicates that, while currently all of its customers are enrolled in state-authorized net metering programs,[6] going forward it may take advantage of the opportunities for distributed energy resources ("DER") to aggregate and participate in the wholesale markets.[7] Sunrun also indicates that changes are needed to the 1 MW rule in the self-certification exemption under PURPA due to the increased growth and concentration of these Sunrun owned resources and issues raised by investors and lenders.[8]

EEI agrees with Sunrun that the markets have evolved, are continuing to evolve, and are providing increasing opportunities for behind-the-meter resources and new technologies to participate in the wholesale markets. While the Petition appears to simply seek a waiver from

[3] *Implementation Issues Under the Public Utility Regulatory Policies Act,* Notice Inviting Post-Technical Conference Comments, Docket No. AD16-16-000.

[4] Petition at 1.

[5] *Id*. at 9-10.

[6] *Id*. at FN 23.

[7] *Id*. at 8.

[8] *Id*. at 8.

the larger than 1-MW self-certification requirement under PURPA that Sunrun understands would apply to a single entity that owns, but has leased ≤ 20 kV PVs, with or without complementary battery systems, that in the aggregate total more than 1 MW in capacity and that are all located within one mile of one another, the issues are larger in scope. EEI suggests that the issues raised in the Petition should be considered in the context of the broader proceedings currently pending before the Commission in its dockets related to aggregation of DERs[9] and PURPA[10] rather than through a Petition for Declaratory Order. It is also unclear from the Petition whether Sunrun is seeking to use these residential facilities (and complementary battery systems) to make sales under PURPA. Given the broader import of the specific proposals raised in the Petition, EEI urges the Commission to stay the application until the broader issues are discussed as part of the holistic review of the Commission's regulations implementing PURPA and the docket examining the operational and technical impacts of DER resources participating in the wholesale markets.

A. The Petition Does Not Address Sunrun's Right to Make Sales Under PURPA.

The Petition raises the issue of the requirement to self-certify a group of commonly-owned ≤ 20 kW PVs located within one mile of one another. Commission Order No. 732 provided for streamlined certification of QFs and an exemption from the filing requirements for any facility otherwise eligible to be a QF with a net power production capacity of 1 MW or

[9] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Notice of Proposed Rulemaking, 157 FERC ¶ 61,121 (November 17, 2016) ("NOPR"); *Participation of Distributed Energy Resource Aggregation in Markets Operated by Regional Transmission Organizations and Independent System Operators* and *Distributed Energy Resources Technical Considerations for the Bulk Power System,* Notice of Technical Conference, Docket Nos. RM18-9-000 and AD18-10-000 (February 15, 2018).

[10] *Implementation Issues Under the Public Utility Regulatory Policies Act,* Notice Inviting Post-Technical Conference Comments, Docket No. AD16-16-000 (September 6, 2016) ("Notice").

less.[11] For eligible facilities larger than 1 MW, the owners or operators have the choice to either self-certify without payment, which requires protestors to pay to object, or to pay for an application for certification and receive a Commission order. Citing the burden of filing a self-certification for the increasing number of ≤ 20 kV PV facilities that it owns but leases to residential customers, Sunrun seeks to waive the self-certification requirement if such facilities sum to more than 1 MW regardless of whether they are all located within one mile of each other. Although Sunrun has clarified that its Petition is *not* intended to address certain issues, the Petition raises questions related to the implementation of PURPA and DER aggregation.

As a preliminary matter, EEI seeks confirmation that this Petition is not addressing sales under PURPA. Sunrun states:

> The requested waiver would apply (i) only to small (≤ 20kW), separately-interconnected, residential PV systems and related equipment for which the homeowner has an option to purchase; and, (ii) only for purposes of calculating the 1 MW filing exemption, and not the 20 MW, 30 MW, or 80 MW thresholds that determine eligibility for exemptions under the Federal Power Act (FPA) and the Public Utility Holding Company Act (PUHCA), *or the right to sell energy and capacity to utilities under the Public Utility Regulatory Policy Act (PURPA).*[12]

EEI understands this last clause to mean that nothing in the Petition addresses whether an entity, such as Sunrun, is permitted to sell power under PURPA from multiple individual PV systems that it owns on an aggregated basis. Although each *individual* ≤20 kW PV facility would qualify to sell energy under PURPA, based on the language above, EEI understands that through this Petition Sunrun is not seeking the authority for an aggregator to sell, under PURPA,

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[11] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, 130 FERC ¶ 61,214, Order No 732 (March 19, 2010). *See also* 18 C.F.R. § 292.203(d)(1).

[12] Petition at 1 (emphasis added).

energy or capacity from a group of such facilities..[13] If this is not the case, such a proposal raises numerous issues many of which would have to be dealt with by state commissions. As such, the proposal raises issues of broad import such that the Commission should prudently refrain from addressing such a significant jurisdictional issue in a proceeding involving an individual petition for declaratory order.

B. The Petition Raises Issues That Are Being Considered by the Commission in Its Review of the Rules and Regulations Implementing PURPA.

While EEI understands that Sunrun is not, through this Petition, seeking to sell power under PURPA from multiple individual PV systems that it owns on an aggregated basis, the Petition raises issues related to the one-mile rule, the self-certification rules, and the determination of power production capacity[14] under PURPA. EEI and other stakeholders have filed comments with the Commission raising concerns with these issues.[15] Accordingly, the issues raised in the Petition are currently pending before the Commission and are of broader import and should not be decided through the instant case. The Petition highlights the continued need for the Commission to institute a broader proceeding to modernize the FERC rules and regulations implementing PURPA and to address these issues within that docket.

[13] In contrast, aggregation of smaller resources to sell to wholesale markets run by ISOs/RTOs is an entirely different issue, as such sales would not be affected *under PURPA*, although such a sale might be exempt from FERC rate regulation were the aggregation comprised entirely of QFs and total under 20 MW in size.

[14] PURPA defines a small power production facility as "a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and (ii) has a power production capacity, which, together with any other facilities located at the same site is not greater than 80 megawatts." 16 U.S.C. § 796 (17)(A) (2012).

[15] *See Implementation Issues Under the Public Utility Regulatory Policies Act,* Supplemental Comments of the Edison Electric Institute, Docket No. AD16-16-000 (June 25, 2018).

1. The Petition implicates issues related to self-certification of small power production facilities and the one-mile rule that are currently pending before the Commission.

As previously indicated, Commission Order No. 732 provided for streamlined certification of small power production facilities and provides an exemption from the filing requirements for any facility with a net power production capacity of 1 MW or less.[16] For facilities larger than 1MW, small power production facilities have the choice to either self-certify without payment, by the applicant, by filing Form 556 or to pay for an application for certification to receive a Commission order. The Commission regulations also allow the Commission to waive the certification requirement for good cause shown by filing a petition for declaratory order.[17] Citing the burden of filing a form 556 self-certification for the increasing number of rooftop solar facilities that it operates and/or owns, Sunrun seeks to waive the filing requirement for certain residential solar aggregations over 1 MW irrespective of whether they are located within one mile of each other. Thus, the Petition requests that the Commission issue a declaratory order that essentially expands the scope of the certification requirements outlined in Order No. 732 and implicates the application of the one-mile rule.

For purposes of determining the 80 MW threshold established by PURPA, the Commission's one-mile rule states that facilities are considered to be "located at the same site as the facility for which [QF] qualification is sought if the facilities are located within one mile of the facility for which qualification is sought."[18] Sunrun indicates that the Petition has no application to the 20 MW, 30 MW or 80 MW thresholds that determine eligibility for

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[16] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, 130 FERC ¶ 61,214, Order No 732 (March 19, 2010). *See also* 18 C.F.R. § 292.203(d)(1).

[17] 18 C.F.R. 292.203(d)(2).

[18] 18 C.F.R. § 292.204(a)(2)(i-ii).

exemptions under PURPA.[19] The Petition does not, however, propose a cap for the self-certification exemption for the ≤ 20 kV facilities that happen to be within the same mile of one another, which raises at least the possibility that the 20 MW or 80 MW threshold could come into play. The Commission has specifically sought comment on the use of the "one-mile rule" to determine the size of an entity seeking certification as a small power production qualifying facility and these issues should be addressed within the context of that proceeding.[20] While Sunrun seeks to waive this requirement for its residential solar aggregations, it does not propose an upper limit for the filing exemption for the aggregated resources. This raises the question of the size of the aggregation for which Sunrun seeks an expansion of the exemption. If granted, the waiver could apply to residential solar resources that are aggregated up to 80 MW without regard to proximity or location.

Sunrun characterizes its facilities as residential PV systems, which implies that they are to serve residents, or in the case of net metering, sold back to the utility under state retail programs. Sunrun also states that it may aggregate these facilities under the Commission's forthcoming rule on participation of DER aggregation in the wholesale markets.[21] As indicated in Section A, Sunrun has not, however, stated that it has or will seek to sell the aggregated output of the facilities in question to a utility under PURPA. This raises the question of how the electric utility would know which of its distribution-connected resources are participating in the aggregation. The Petition also raises issues related to double compensation as the electric utility would not know which of its net-metered customers was also participating in an aggregation to receive avoided costs payments under PURPA. The filing requirements in question addresses

[19] Petition at 1.

[20] Notice.

[21] Petition at 8.

and provides the transparency needed to address these issues. The question as to what program the facilities will utilize to sell their output should be addressed in any resolution of the Petition.

2. The Petition raises the question of how "power production capacity" should be calculated for residential, net metered solar PV facilities with and without battery energy storage capability.

The Petition also indirectly implicates an issue that was raised in Beaver Creek's Application for Certification of QF Status.[22] The Petition requests that the waiver apply not only to the solar facility but also to complementary battery storage facilities. As indicated in EEI's comments in response to Beaver Creek's Application, the Commission has not issued a rule, regulation or order specifically defining "power production capacity." Form 556, which applicants fill out as part of the self-certification process, requires applicants to list in line 7a the gross power production under the most favorable design conditions and then deduct a variety of losses from the gross power production capacity to get to the net power production capacity in line 7g.[23] Although not explicitly stated, it appears that the Commission uses the net power production capacity to determine if a facility should be certified as a QF. The form does not specifically address the inclusion of other resources, such as batteries, connected to the resource.[24]

This raises a number of questions that are not addressed in the Petition. First, if a 1 MW small power production facility also includes a battery storage facility, should the capacity of the battery storage facility be included in the determination of whether the resource qualifies for the

[22] *Application for Certification of Qualifying Small Power Production Facility Status*, Beaver Creek Wind II, L.L.C., Docket No. QF17-673-002 (August 14, 2018) ("Beaver Creek's Application").

[23] Form 556 at p 1, 9. https://www.ferc.gov/docs-filing/forms/form-556/form-556.pdf

[24] *Application for Certification of Qualifying Small Power Production Facility Status*, Beaver Creek Wind II, Motion to Intervene and Comments of the Edison Electric Institute, Docket No. QF17-673-002 (September 4, 2018)

existing 1 MW self-certification waiver. Second, the Petition indicates that the waiver would only apply to small ≤ 20 kW separately interconnected, residential PV systems and related equipment. The Petition does not address whether the proposed ≤ 20 kW threshold includes the associated battery capacity.

These questions must be addressed prior to any ruling on the Petition as it impacts the size of the possible aggregation. As EEI indicated in its comments in response to Beaver Creek's Application, the addition of the battery storage capacity could, at times, result in an aggregation with output greater than 80 MW. The addition of the battery storage could also result in resources with capacity greater then ≤ 20 kW being able to participate in the aggregation. These questions need to be addressed in any resolution of the Petition.

C. The Petition Implicates the Commission's Ongoing Proceeding on DER Aggregation

Similarly, the Petition raises questions associated with the NOPR on DER aggregation as Sunrun indicates that it would like to take advantage of the opportunity to aggregate the solar facilities that it leases to residential customers and participate in the relevant organized market. This proposition raises some concerns. For example, the Petition raises questions about who has ownership of the excess energy generated from residential PV systems, who the excess energy will be sold to, and the related issue of who has jurisdiction over the interconnection service being provided.[25]

[25] Under *Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182 at 61,661-62 (1992), *aff'd sub nom*, Western *Massachusetts Electric Co. v. FERC*, 165 F.3d 922, 925-27 (D.C. Cir. 1999) (*WMECo*), and its progeny, any QF located anywhere on a utility system must take FERC-jurisdictional interconnection service if sales are to be made to somebody other than the distribution utility. Although QFs already interconnected under state jurisdiction may switch to a FERC-jurisdictional interconnection agreement, for new construction, knowing whether the interconnection facilities will be state or FERC jurisdiction will eliminate waste and confusion and promote regulatory certainty. Thus, the distribution utility must know the plans of a QF to know whether its interconnection is FERC- or state-jurisdictional in the first instance.

The Petition also raises issues that that were discussed in the DER aggregation NOPR and technical conference related to compensation, dual participation, participation criteria, eligibility, and how the distribution utility would be notified which program(s) the individual facility, the retail customer and the aggregator is/are participating in. These issues, among others, were discussed in comments in response to the NOPR and need to be addressed prior to making a determination on the Petition.[26] These issues are of broad import and need to be addressed to ensure that the distribution utility has the information necessary to reliably operate the distribution system and should be discussed in the DER proceeding.

D. The Issues Raised in the Petition Are of Broad Import and Should Not Be Addressed Through the Instant Petition for Declaratory Order.

Due to these broader implications and questions, EEI does not through these comments take a position on the proposal in the Petition. FERC's website contains a definition for "Petition for Declaratory Order" as: "[A] petition requesting the issuance of an order or ruling on jurisdictional issues where uncertainty, ambiguity, or controversy exists. The petition may seek an interpretation of a party's rights or obligations under contracts, statutes, rules, regulations, or order."[27] As discussed herein, the instant Petition raises issues of broader import that are not limited to an interpretation of a party's rights. Accordingly, these issues should not be addressed through a declaratory order. EEI requests that the Commission consider the issues raised in the Petition in the broader proceedings related to PURPA and DER aggregation. Given that Sunrun

[26] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Comments of the Edison Electric Institute, Docket No. RM16-23-000 (February 13, 2017); *Participation of Distributed Energy Resource Aggregation in Markets Operated by Regional Transmission Organizations and Independent System Operators* and *Distributed Energy Resources Technical Considerations for the Bulk Power System*, Post-Technical Conference Comments of the Edison Electric Institute, Docket No. RM18-9-000 (June 26, 2018).

[27] https://elibrary.ferc.gov/idmws/help/Definitions/Sub_Definitions/Submittal/Applicaiton_Petition_Definitions.htm

has indicated that it does not intend to immediately start aggregating existing or new QF facilities to sell power to organized markets under circumstances whether the one-mile rule would come in to play, but seeks a preemptive Declaratory Order, there is no harm to Sunrun by addressing the issues raised by the Petition in the context of the relevant, broader proceedings.

IV. CONCLUSION

EEI appreciates the opportunity to comment and urges the Commission not to grant the requested relief for the reasons stated herein.

Respectfully Submitted,

/s/ Lopa Parikh

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October 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 24th day of October 2018.

/s/ Lopa Parikh

_____

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ATTACHMENT D

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Northwestern Corporation	)	Docket No. EL19-3-000

MOTION TO INTERVENE AND COMMENTS
OF THE EDISON ELECTRIC INSTITUTE

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, and the Commission's Notice of Petition for Declaratory Order dated October 3, 2018, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby respectfully submits this Motion to Intervene and Comments in response to the Petition for Declaratory Order ("Petition") of Northwestern Corporation ("Northwestern").

I. MOTION TO INTERVENE

Pursuant to Rule 214, 18 C.F.R. § 385.214, EEI submits the following in support of its Motion. EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. Safe, reliable, affordable, and clean energy powers the economy and enhances the lives of all Americans. EEI's diverse membership includes electric utilities in all areas of the country, including utilities that serve customers in Montana and that are regulated by the Montana Public Service Commission ("MPSC").

While the Petition addresses a specific order issued by the MPSC, the Petition raises

important issues regarding the Commission's rules implementing the Public Utilities Regulatory Policies Act of 1978 ("PURPA") that are not unique to Northwestern. Section 210 of PURPA requires all electric utilities to purchase electricity at "avoided cost" from qualifying small power producers or qualifying co-generation facilities, referred to as Qualifying Facilities ("QFs"). As electric utilities, all EEI members are subject to PURPA's mandatory purchase requirements, unless granted an exemption by the Commission.[1]

Current Commission policy on how PURPA should be implemented is embodied in FERC rules as well as precedent established in Commission orders in individual cases. As such, EEI's members will be directly affected by any Commission decision in the instant docket. EEI provides a broad-based perspective on the issues raised in the Application that cannot be adequately represented by any other party. EEI respectfully requests that the Commission grant this Motion to Intervene and allow EEI to become a party to the above-captioned proceedings.

II. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to this Motion should be served upon the following individuals who should be included on the official service lists compiled by the Secretary of the Commission in these proceedings:

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[1] *See* 18 C.F.R. § 292.309.

III. COMMENTS

PURPA was enacted to promote energy conservation and foster greater use of domestic energy sources, including renewable energy sources. PURPA provides simple directives for purchases of QF power by electric utilities: "the rates for such purchases – 1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and 2) shall not discriminate against qualifying cogenerators or qualifying small power producers."[2] In addition, PURPA directs that the rate for purchases of QF power shall not "exceed[] the incremental cost to the electric utility."[3] Section 210 of PURPA[4] requires all electric utilities to purchase electricity at "avoided cost" from QFs and it is the Commission's obligation to implement PURPA in coordination with state regulatory authorities.[5] All of these issues are implicated in the Petition and are currently pending before the Commission.

On June 29, 2016, the Commission convened a technical conference that focused on issues associated with the Commission's implementation of PURPA and to specifically discuss issues related to the mandatory purchase obligation and the determination of avoided costs for the purchases in light of the changing electric market.[6] State commissioners among others urged the Commission to review its regulations and clarify what is meant by paying avoided costs.[7]

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[2] 16 USC 824-1-3(b) (2012).

[3] 16 USC 824a-3(b) (2012).

[4] 16 U.S.C. § 824a-3 (2012).

[5] *See e.g. Portland General Co.* v. FERC., 854 F.3d 692 (D.C. Cir. 2017) (Under the Act, FERC prescribes "broad, generally applicable rules" which state commissions implement at the local level.); FERC v. Mississippi, 456 U.S. 742, 751 (1982) (State commissions "may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules."); PURPA § 210(b), (f), 16 U.S.C. § 824a-3(b), (f).

[6] *Implementation Issues Under the Public Utility Regulatory Policies Act*, Supplemental Notice Concerning Technical Conference, Docket No. AD16-16-000 (March 4, 2016) ("Technical Conference").

[7] *See e.g.* Transcript for the 6/29/16 Technical Conference on Implementation Issues under the Public Utility Regulatory Policies Act of 1978, Docket No. AD16-16 at p 201, lines 21-25 – p 202, lines 1-13. Commissioner Raper also urges the Commission to never allow "the desire for renewable resources … [to] overshadow or

The issue of how to determine avoided costs was also discussed in post-technical conference comments filed with the Commission.[8] In its Supplemental Comments, EEI specifically raised the issue of whether, consistent with the language in Order No. 69,[9] states have the ability to set avoided costs to zero if the electric utility does not have a need for the capacity or energy.[10] Similarly, in its Petition, Northwestern relies on Order No. 69 to question if states have the ability under the Commission's rules to set avoided costs at zero if the energy is not needed to serve load. The fundamental questions at issue in the Petition are at the core of the Commission's regulations implementing PURPA. These include what it means to have rates for purchases from QFs that are 1) just and reasonable to the electric consumers of the electric utility and in the public interest, and 2) not discriminatory against qualifying cogenerators or qualifying small power producers.

While EEI does not take a position on the MPSC order or its interpretation of Order No. 69, the issues in the both instances highlight the need for the Commission to undertake a holistic review of its regulations implementing PURPA. The Commission should ensure that, due to changes in the energy markets, the Commission's rules and regulations implementing PURPA do not promote the uneven, unplanned, and uneconomic development of QFs and provide

outweigh reliability;" *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Statement of Travis Kavulla, President, National Association of Regulatory Utility Commissioners, Docket No. AD16-16-000, (June 30, 2016).

[8] *See e,g. Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Post Technical Conference Comments of the Edison Electric Institute, Docket No. AD16-16-000 (November 7, 2016) ("EEI Comments"); *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Supplemental Comments of the Edison Electric Institute, Docket No. AD16-16-000 (June 25, 2018) ("Supplemental Comments").

[9] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utilities Regulatory Policies Act of 1978,* Order No. 69, FERC Stats.& Regs. ¶ 301,128 (1980). " A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate ***should only include payment for energy or capacity which the utility can use to meet its total system load*** (emphasis added)." Order No. 69 at 30,870.

[10] Supplemental Comments at Attachment A, pp 5-6.

for subsidies that promote QFs at the expense of customers, system reliability, and other more competitive resources.

IV. CONCLUSION

EEI appreciates the opportunity to comment and urges the Commission not to grant the requested relief for the reasons stated herein.

Respectfully Submitted,

/s/ Lopa Parikh

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November 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 1st day of November 2018.

/s/ Lopa Parikh

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ATTACHMENT E

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Great Divide Wind Farm 2 LLC	)	
Great Divide Wind Farm 3 LLC	)	Docket No. EL19-25-000

MOTION TO INTERVENE AND COMMENTS OF
THE EDISON ELECTRIC INSTITUTE

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, and the Commission's Notice of Petition for Enforcement dated December 7, 2018, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby respectfully submits this Motion to Intervene and Comments ("Motion") in response to the Petition for Enforcement ("Petition") of Great Divide Wind Farm 2, LLC and Great Divide Wind Farm 3, LLC (collectively "Great Divide Farm"). As discussed herein, the issues raised in the Petition are of broad import and are currently being discussed as part of a larger discussion reviewing the Commission's regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA").[1] Accordingly, EEI urges the Commission to deny the Petition as a valid exercise of state authority under PURPA, or in the alternative, stay the Petition until the issues are addressed through a generic proceeding.

I. MOTION TO INTERVENE

Pursuant to Rule 214, 18 C.F.R. § 385.214, EEI submits the following in support of its Motion. EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans and operate in all 50 states and the

[1] *See Implementation Issues Under the Public Utility Regulatory Policies Act,* Docket No. AD16-16-000

District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. Safe, reliable, affordable, and clean energy powers the economy and enhances the lives of all Americans. EEI's diverse membership includes electric utilities in all areas of the country, including utilities that serve customers in New Mexico and are regulated by the New Mexico Public Regulation Commission ("NMPRC"), such as Public Service Company of New Mexico and El Paso Electric Company ("EPE").

While the Petition addresses a specific order issued by the NMPRC, the Petition raises important issues regarding the federal and state roles in implementing PURPA. Section 210 of PURPA requires all electric utilities to purchase electricity at "avoided cost" from qualifying small power producers or qualifying cogeneration facilities, referred to as Qualifying Facilities ("QFs"). As electric utilities, all EEI members are subject to PURPA's mandatory purchase requirements unless granted an exemption by the Commission.[2] While EEI does not, through these comments, take a position on the specific PURPA rules in New Mexico, EEI would like to highlight the state's role in implementing PURPA and the need for collaborative federalism.

The Commission's implementation of PURPA is embodied in regulations and guidance issued by the Commission through case-specific orders. Any guidance provided in this case may influence courts or other state public utility commission decisions, such that EEI's members will be directly affected by the Commission's issuance in the instant docket. EEI provides a broad-based perspective on the issues raised in the Petition that cannot be adequately represented by any other party. EEI respectfully requests that the Commission grant this Motion to Intervene and allow EEI to become a party to the above-captioned proceedings.

[2] *See* 18 C.F.R. § 292.309 (2018).

II. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to this Motion should be served upon the following individual, who should be included on the official service lists compiled by the Secretary of the Commission in these proceedings:

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III. COMMENTS

The Commission convened a Technical Conference on June 29, 2016, to discuss issues related to the mandatory purchase obligation and the determination of avoided costs, of which the determination of the legally enforceable obligation ("LEO") is an integral part, for such purchases in light of the changing electric market.[3] The Petition implicates these issues as in its Petition, Great Divide Farm requests that the Commission initiate an enforcement action against the NMPRC and alleges that the NMPRC has failed to implement PURPA consistent with federal law and the Commission's regulations by finding that "a legally enforceable obligation for EPE to purchase the electric power generated by the Projects cannot be created until the Projects are constructed and ready to be interconnected to the EPE transmission system …."[4] Great Divide Farm also indicates that under sections 292.304(b)(5)[5] and 292.304(d)(2)[6] of the

[3] *Implementation Issues Under the Public Utility Regulatory Policies Act,* Supplemental Notice Concerning Technical Conference, Docket No. AD16-16-000 (March 4, 2016).

[4] Petition at 2-3.

[5] 18 C.F.R. § 292.304(b)(5).

[6] *Id.* at § 292.305(d)(2).

Code of Federal Regulations, the Commission has prescribed rules that impose obligations on electric utilities to establish long-term, fixed-price purchase arrangements, thereby enabling sponsors to develop and finance QFs.[7] EEI disagrees with this interpretation.

PURPA was enacted to promote energy conservation and foster the development of domestic energy sources, including renewable energy sources. Section 210 of PURPA[8] requires all electric utilities to purchase electricity at their "avoided cost" from QFs, and it is the Commission's obligation to implement PURPA in coordination with state regulatory authorities.[9] Under PURPA, state public utility commissions are responsible for calculating the avoided-cost rates and setting associated contract terms and conditions for utilities subject to their jurisdiction, including when the LEO arises. Through its Petition, Great Divide Farm is asking the Commission to limit the ability of state commissions to set these terms.

While the NMPRC is required to implement PURPA consistent with the statute and Commission regulations, the NMPRC has discretion on a number of important issues associated with the mandatory purchase of QF power. PURPA provides simple directives for purchases of QF power by electric utilities: "the rates for such purchases – 1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and 2) shall not discriminate against qualifying cogenerators or qualifying small power producers."[10] Thus, while PURPA sought to promote energy generation by QFs, it also sought to protect the interests

[7] Petition at 2.

[8] 16 U.S.C. § 824a-3 (2012).

[9] *See, e.g.*, *Portland General Co. v. F.E.R.C.*, 854 F.3d 692 (D.C. Cir. 2017) (Under the Act, FERC prescribes "broad, generally applicable rules" which state commissions implement at the local level.); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 751 (1982) (State commissions "may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules."); PURPA § 210(b), (f), 16 U.S.C. § 824a-3(b), (f).

[10] 16 U.S.C. 824-1-3(b).

of the retail customer. As a result, PURPA requires electric companies to purchase power from QFs and also requires that the "rates paid for the power to be set at the incremental cost of alternative electric energy,"[11] or at an "avoided-cost price," which has been defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."[12] This avoided-cost pricing was deemed to be just and reasonable to customers because it was not to exceed the costs that electric companies would have incurred to generate the power themselves or purchase the power from other third parties. Essentially, the avoided cost should be set in a way that holds customers harmless.

Great Divide Farm errs by relying on sections 292.304(b)(5) and (d)(2) to support its claim that the Commission requires long-term contracts for QFs or otherwise determines the rates, terms and conditions of the contract. While section 292.304 does establish parameters for state commissions to use when determining rates for purchase, it does not and cannot take away the state's commission authority to set avoided costs or to determine the date on which a LEO arises. Section 292.304(d)(2) states that:

> **(2)** To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> **(i)** The avoided costs calculated at the time of delivery; or
>
> **(ii)** The avoided costs calculated at the time the obligation is incurred.

[11] *Id.* at § 824a-3(d).

[12] 18 C.F.R. § 292.101(b)(6).

While the section gives a QF that has established a LEO the option to determine the method by which avoided costs will be calculated, it does not, as suggested by Great Divide Farm, eliminate the state commission's authority to determine when the LEO is created.

Great Divide Farm relies on the Commission's decision in *FLS Energy, Inc*. in support of its position.[13] In that decision, the Commission issued an opinion on a Montana rule that required a QF to have an executed interconnection agreement to have a LEO. The Commission maintained that the Montana Commission's requirement violated PURPA because the rule would allow the utility to control whether and when a LEO arose by delaying the facilities study or delaying the tender of an executable interconnection agreement.[14] While this decision speaks only to Montana's general rule requiring an executed interconnection agreement as a condition to LEO formation, the Commission did not address or consider in that order a utility's obligations under its tariff to facilitate interconnection and the mechanisms available to enforce the tariff. EEI suggests that if a utility is delaying the interconnection process, then that is an issue that should be raised with the Commission, rather than imposing an interpretation of PURPA onto state commissions that takes away their ability to ensure that PURPA's mandate of ensuring that customers are indifferent to the source of the energy is met.

As demonstrated by the Petition, some QFs believe that merely notifying a utility that the QF desires to sell energy to the utility obligates the utility to purchase that QF's output and locks in the price for future deliveries.[15] This type of optionality would put the electric utility at risk as the utility would not be able to reliably plan its system and ensure resource adequacy. It would also place customers at risk of paying more than the avoided cost as rates would be locked in for

[13] Petition at 9-10.

[14] *FLS Energy, Inc.*, 157 FERC ¶ 61,211 (2016).

[15] Petition at 10.

future deliveries. In its Supplemental Comments, EEI requested that the Commission clarify, as several courts have ruled, that the state commission has the right to determine that a LEO does not arise until a project is "viable"[16] and that the Commission should defer to states in determining when the LEO arises[17] as it is critical to assuring the relative accuracy of a calculated "avoided-cost" price.[18] Thus, the Petition raises issues of cooperative federalism and the appropriate exercise of state authority in determining the calculation of avoided costs that are currently pending before the Commission in its generic docket. The Commission should provide clarity on this issue of broad import in the generic proceeding rather than through the instant Petition.

IV. CONCLUSION

EEI appreciates the opportunity to comment. As discussed herein, the issues in the Petition are of broad import and are currently being discussed as part of a larger discussion reviewing the Commission's regulations implementing PURPA. EEI urges the Commission to deny the Petition as a valid exercise of state authority under PURPA or, in the alternative, to

[16] *See Appeal of Public Service Co. of New Hampshire*, 539 A.2d 275 (N.H. 1988) (the court found viability had been established where the cogenerator had acquired sufficient permits for construction and operation, had received "not-to-exceed" construction quotes, had secured the property rights to the site, had executed a steam contract, and financing arrangements had progressed sufficiently to warrant the grant of a long-term agreement); *South River Power Partners, LP v. Pennsylvania Pub. Utility Comm'n,* 696 A.2d 926 (Pa. Cmwlth.1997) (the court found the project was not viable because the project developer had not applied for or gained any of the permits that would be required for the project, had not engaged a consultant to procure those permits, and had only held discussions with investment bankers but had not received financing for the project); *Mid-South Cogeneration, Inc. v. Tenn. Valley Auth.*, 926 F. Supp. 1327, 1337 (E.D. Tenn., 1996) (a federal district court concluded that a developer was not eligible to receive a LEO where the facility did not exist); and *Power Resource Group Inc v. Pub. Utility Comm'n of Texas,* 422 F.3d 231 (5thCir. (2005) (the court upheld a rule adopted by the Public Utility Commission of Texas that provides that a LEO cannot be created more than 90 days in advance of the effective date of the LEO).

[17] *See Grouse Creek Wind Park, LLC,* Notice of Intent to Act, 142 FERC ¶ 61,187 (2013) (recognizing that it is up to the states, not the Commission, to determine the specific parameters of individual PPAs, including the date at which a LEO arises under state law, and further stating that it is within FERC's authority to bring an enforcement action to correct a state's "misreading" of FERC's PURPA rules and precedent).

[18] *Implementation Issues Under the Public Utility Regulatory Policies Act,* Supplemental Comments of the Edison Electric Institute, Docket No. AD16-16-000 (June 25, 2018) at Attachment A, pp 7-8.

stay the Petition until the issues are addressed through its ongoing generic proceeding.

Respectfully submitted,

/s/ Lopa Parikh

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December 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 27th day of December 2018.

/s/ Lopa Parikh

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